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First Yield Sdn Bhd v All Persons in Occupation of the Land Held Under Provisional Lease No 076290036 and Provisional Lease No 07622148 at Mile 36, Sg Memanjang Simpang Jalan Beluran, Sandakan, Sabah

B

HIGH COURT (SANDAKAN) — ORIGINATING SUMMONS NO 24–16 OF 2010
LEE HENG CHEONG JC
C 26 APRIL 2011

Land Law — Tresspass — Unlawful occupation — Action for recovery — Summary procedure — Claim of native customary right by occupiers not proven — Several occupiers not residing on land in question — Whether claim that occupiers occupied land with licence permission or consent of previous registered owner proven — Whether triable issues shown — Rules of the High Court 1980 O 89

Native Law and Custom — Land dispute — Customary rights over land — Whether established — Failure to establish native customary rights under s 15 of the Interpretation (Definition of Native) Ordinance — Wether claim to native customary right occurring after land titles were issued could not be sustained

The plaintiff applied under O 89 of the Rules of the High Court 1980, for an order that the plaintiff recover possession of certain lands ('the said lands') located at Mile 36, Sg Memanjang Simpang, Jalan Beluran, District of Sandakan, Sabah. It was contended that the plaintiff was entitled to possession and that the defendants were in occupation of the said lands without the licence or consent of the plaintiff. The plaintiff was the registered owner of the said lands. The said lands had been transferred by the previous registered owner namely Sungai Pasir Co-operative Land Development Society Ltd ('the said cooperative society') to the plaintiff. Subsequently the plaintiff had issued a notice to all those persons in occupation to vacate the said Lands. Following the notice, the plaintiff received a letter dated 8 January 2010 from an unidentified person claiming that, amongst others: (i) the persons in occupation of the said lands were buyers and had prior interests in the said lands; (ii) they were members of the said cooperative society and had developed the said lands some 30 years earlier; and (iii) they refused to vacate the said lands and challenged the plaintiff to take action in court. The plaintiff had not at any material time after acquiring title given any permission licence or consent, written or otherwise, to any of the defendants or unknown persons to enter into or occupy the said lands. The defendants claimed that they were natives of Sabah within the meaning of s 2(1)(a) of the Interpretation (Definition of Native) Ordinance ('the said Ordinance') and therefore they were not trespassers or illegal squatters

but had 'native customary right' and interests to claim ownership of the said lands. The defendants also claimed that being registered members of the said cooperative society, they had legal rights to lawfully occupy, cultivate and build structures and houses on the said lands.

Held, allowing the plaintiff's originating summons:

(1) The defendants merely raised a claim to native customary rights but failed to prove that they had established such rights under s 15 before the collector of land revenue or that their claim had been dealt with by the collector of land revenue either by way of money compensation or by a grant of land title issued under part IV of the Land Ordinance as statutorily provided for in s 16 of the said Ordinance (see para 19).

(2) The defendants were alleging that they had developed and built houses on the said land for the past 30 years which would put the time period sometime in 1980 or thereabout, well after the documentary titles to the said lands had been registered. The defendants' claim to native customary right occurring at a time well after the land titles were issued could not be sustained (see para 20); *Ng Kon Yu v Sakim bin Saiking & Ors* [2006] 3 MLJ 533 referred.

(3) Several of the defendants were not fit to be considered as defendants or person in occupation of the said lands as it was admitted that they were permanently residing at Kampong Sg Batang Sandakan, District of Sandakan, Sabah and not at or within the said lands. As such, they are not competent to oppose the plaintiff's application or to make any allegations against the plaintiffs pertaining to the said lands (see para 21).

(4) The 10 named persons were not registered members of the said cooperative society according to the list of membership (see para 25).

(5) There was no allegation of fact in any of the affidavit in oppositions from any of the 'defendants' or 'person in occupation' that they had entered into the said lands at any material time with the licence permission or consent of the previous registered owner ie the said cooperative society. On the contrary, the 'defendants' claimed as Malaysians and natives of Sabah they 'have legal rights to lawfully occupy, cultivate and built tenements/building structures and houses on the said lands'. Accordingly, an adverse inference and finding had to be made against the defendants on this fact alone. As such, the defendants were trespassers and squatters without any licence or consent whatsoever to occupy or continue to occupy the said land. There were no triable issues in this application (see paras 27–28).

[Bahasa Malaysia summary

Plaintif memohon di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980, untuk satu perintah bahawa plaintif mendapatkan semula milikan beberapa

hartanah ('hartanah tersebut') yang terletak di Batu 36, Sg Memanjang Simpang, Jalan Beluran, Daerah Sandakan, Sabah. Dihujahkan bahawa plaintif berhak untuk milikan dan defendan-defendan yang menduduki hartanah tersebut adalah tanpa lesen atau persetujuan plaintif. Plaintif merupakan pemilik berdaftar hartanah tersebut. Hartanah tersebut telah dipindahkan oleh pemilik terdahulu iaitu Sungai Pasir Co-operative Land Development Society Ltd ('pertubuhan koperasi') kepada plaintif. Seterusnya plaintif mengeluarkan notis kepada semua orang yang menduduki hartanah tersebut untuk mengosongkannya. Selepas notis tersebut dikeluarkan, plaintif menerima sepucuk surat bertarikh 8 Januari 2010 daripada orang yang tidak dikenali, mendakwa bahawa, antara lain: (i) orang-orang yang menduduki hartanah tersebut merupakan pembeli-pembeli dan mempunyai kepentingan terlebih dahulu dalam hartanah tersebut; (ii) mereka merupakan ahli pertubuhan koperasi tersebut dan telah membangunkan hartanah tersebut 30 tahun yang lalu; dan (iii) mereka enggan untuk mengosongkan hartanah tersebut dan mencabar plaintif untuk mengambil tindakan di mahkamah. Plaintif tidak pernah, pada mana-mana masa material, selepas mendapatkan hakmilik, memberikan sebarang kebenaran, lesen atau persetujuan, bertulis atau sebaliknya, kepada mana-mana defendan atau orang-orang yang tidak dikenali tersebut untuk memasuki atau menduduki hartanah tersebut. Defendan-defendan mendakwa bahawa mereka merupakan orang asli Sabah seperti yang terangkum di bawah tafsiran s 2(1)(a) Ordinan Tafsiran (Takrif Anak Negeri) ('Ordinan tersebut') dan oleh itu mereka bukan merupakan penceroboh atau setinggan haram tetapi mempunyai 'hak tanah adat bumiputra' dan kepentingan-kepentingan untuk menuntut milikan hartanah tersebut. Defendan-defendan juga mendakwa bahawa setelah didaftarkan sebagai ahli pertubuhan koperasi tersebut, mereka mempunyai hak di sisi undang-undang untuk menduduki, membangunkan dan membina struktur-struktur dan rumah-rumah secara sah di atas hartanah tersebut.

Diputuskan, membenarkan saman pemula plaintif:

(1) Defendan-defendan hanya menimbulkan tuntutan untuk hak tanah adat bumiputra tetapi gagal untuk membuktikan bahawa mereka telah mengesahkan hak tersebut di bawah s 15 di hadapan pemungut hasil tanah atau tuntutan mereka telah diuruskan oleh pemungut hasil tanah sama ada melalui ganti rugi wang atau dengan memberikan hakmilik tanah yang dikeluarkan melalui Bahagian IV Ordinan Tanah mengikut undang-undang yang diperuntukkan di dalam s 16 Ordinan tersebut (lihat perenggan 19).

(2) Defendan-defendan mendakwa bahawa mereka telah membangunkan dan membina rumah-rumah di atas hartanah tersebut selama tempoh 30 tahun yang lalu iaitu dalam jangka masa sekitar 1980 atau lebih kurang dalam jangka masa tersebut, sejurus selepas dokumen hakmilik kepada hartanah tersebut didaftarkan. Tuntutan defendan-defendan untuk hak

tanah adat bumiputra yang dibuat selepas hakmilik hartanah tersebut dikeluarkan tidak dibenarkan (lihat perenggan 20); *Ng Kon Yu v Sakim bin Saiking & Ors* [2006] 3 MLJ 533 dirujuk.

(3) Beberapa defendan tidak sesuai dianggap sebagai defendan-defendan atau orang yang menduduki hartanah tersebut memandangkan diakui bahawa mereka menetap secara tetap di Kampong Sg Batang Sandakan, Daerah Sandakan, Sabah dan tidak berada atau menduduki hartanah tersebut. Oleh itu, mereka tidak kompeten untuk mencabar permohonan plaintif atau membuat sebarang dakwaan terhadap plaintif mengenai hartanah tersebut (lihat perenggan 21).

(4) Sepuluh orang yang dinamakan bukanlah ahli berdaftar pertubuhan koperasi tersebut menurut senarai keahlian (lihat perenggan 25).

(5) Tidak terdapat dakwaan fakta dalam mana-mana afidavit pembangkang daripada mana-mana 'defendan' atau 'orang yang menduduki' bahawa mereka telah memasuki hartanah tersebut pada bila-bila masa material dengan kebenaran lesen atau persetujuan pemilik berdaftar terdahulu, iaitu pertubuhan koperasi tersebut. Sebaliknya, 'defendan-defendan' mendakwa sebagai rakyat Malaysia dan orang asli Sabah, mereka 'mempunyai hak di sisi undang-undang untuk menduduki, membangunkan dan membina kediaman/struktur-struktur bangunan dan rumah-rumah secara sah di atas hartanah tersebut'. Sewajarnya, satu kesimpulan bertentangan dan dapatan perlu dibuat terhadap defendan-defendan berdasarkan fakta ini semata-mata. Oleh itu, defendan-defendan merupakan penceroboh dan setinggan tanpa sebarang lesen atau persetujuan untuk menduduki atau terus mendiami hartanah tersebut. Tidak terdapat isu-isu untuk dibicarakan di dalam permohonan ini (lihat perenggan 27–28).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 682–711.

For cases on unlawful occupation, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5405–5417.

Cases referred to

Ng Kon Yu v Sakim bin Saiking and Ors [2006] 3 MLJ 533, HC (refd)

Zaibar Auto (M) Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd [1996] 2 MLJ 221, CA (refd)

Legislation referred to

Co-operative Societies Act 1993 s 64

Interpretation (Definition of Native) Ordinance (Sabah Cap 64) s 2(1)(a)

Land Ordinance (Sabah Cap 68) ss 14, 15, 16, 65, 66

A Rules of the High Court 1980 O 89

Philip Lee Vui Keong (Lee & Aziz) for the plaintiff.
Abdul Razak (Razak & Associates) for the defendants.

B **Lee Heng Cheong JC:**

NATURE OF APPLICATION

[1] The plaintiff has filed an application under O 89 of the Rules of the High C Court 1980, for an order that the plaintiff recover possession of the lands held under Provisional Leases No 076290036 (150.5 Acres) and Provisional Lease No 07622148 (156 Acres), ('the said lands') both located at Mile 36, Sg Memanjang Simpang, Jalan Beluran, District of Sandakan, Sabah, Malaysia, on the grounds that the plaintiff are entitled to possession and that the D defendants are in occupation of the said impugned land without the licence or consent of the plaintiff.

[2] I have read and considered the following documents filed in court:

E (a) the plaintiff's originating summons for possession (under O 89) of the Rules of the High Court 1980, with the plaintiff's non-executive director (Lo Kim San) affidavit in support sworn on 17 March 2010: (the plaintiff's originating summons application);

F (b) the affidavit in opposition (Shariff Abdul Rahman bin Shariff Omang) as one of the defendants made against the plaintiff's application, affirmed on 26 May 2010; (Shariff's affidavit in opposition);

(c) the affidavit in opposition (Muhammad Sha bin Daris) as one of the defendants made against the plaintiff's application, affirmed on 26 May G 2010; (Muhammad's affidavit in opposition),

(d) the plaintiff's affidavit in reply affirmed on 9 June 2010 (made against Shariff's affidavit in opposition; (plaintiff's affidavit in reply); and

(e) the plaintiff's affidavit in reply affirmed on 9 June 2010 (made against H Muhammad's affidavit in opposition; (the plaintiff's affidavit in reply).

THE PLAINTIFF'S CASE

[3] The plaintiff is the registered owner of the said lands. This is evidence I from the title deed for the said lands under its Titles No 076290036 and No 076221148 which is marked as 'LKS1' and 'LKS2' respectively in the plaintiff's affidavit in support.

[4] On or about 3 December 2009 the said Lands were transferred by the

previous registered owner namely Sungai Pasir Co-Operative Land Developoment Society Ltd, a cooperative duly registered in Sabah under Registration No 78/62 and having its correspondent address at Mile 36, Sg Memanjang, Simpang Jalan Beluran, PO Box 1000, 90711 Sandakan, Sabah ('the said cooperative society') to the plaintiff.

[5] On or about 21 December 2009 the plaintiff had issued a notice to all those persons in occupation to vacate the said lands.

[6] Following the notice of the plaintiff dated 21 December 2009, the plaintiff received a letter dated 8 January 2010 from an unidentified person. The letter dated 8 January 2010 to the plaintiff claimed that among others:

(a) the persons in occupation of the said lands or parts thereof are buyers and have prior interests in the said lands;

(b) they are members of the said cooperative society and have developed the said lands some 30 years earlier; and

(c) they refused to vacate the said lands and challenged the plaintiff to take action in court.

[7] The plaintiff also received a letter dated 11 January 2010 from a person by the name of Bakri bin Aking and asking that he and one Nuna bt Aking be allowed to stay in their present house. The plaintiff did not agree to any person or persons staying on the said lands or any part thereof.

[8] In or around late January, 2010 the plaintiff was approached by some persons claiming that they were members of the said cooperative society and interested in the said lands and the plaintiff had referred the names of those persons laying claims to the said cooperative society for verification as to whether those person or persons were at any material time members of the said cooperative society or had any interest in the said lands or any part thereof.

[9] On 8 February 2010 the said cooperative society by its secretary duly replied and confirmed to the plaintiff that those persons whose names were referred to were not members on the register of members of the said cooperative society and neither of the persons referred to, had been given any permission to enter or stay on the said lands or any part thereof. A copy of the relevant letter issued by the said cooperative society to the plaintiff is marked as 'LKS6' in the plaintiff's affidavit in support. The said cooperative society further provided a list of their registered members to the plaintiff which marked as 'LKS7' in the plaintiff's affidavit in support.

[10] The plaintiff is desirous of developing the said lands by cultivating the

same with oil palm crops in accordance with good husbandry practice. As such, it is essential for the plaintiff to take possession of the said lands without delay to take advantage of favourable weather and planting conditions. The defendants on the other hand are trying to deprive the plaintiff from taking possession and control of the said lands as a means to perpetuate their continued occupation of the said lands or parts thereof.

[11] The defendants have entered into and occupied the said lands or parts thereof and erected thereon houses and building structures without permission, licence or consent from the said cooperative society and the defendants and/or their family and/or dependants are now occupying the said houses or building structures. The plaintiff has not at any material times after acquiring title given any permission licence or consent, written or otherwise, to any of the defendants or unknown persons or intruders to enter into or occupy the said lands or any part thereof. The plaintiff has further not granted any lease or tenancy to any person or persons to stay or to use the said lands or any part thereof for any other purpose at any material time.

[12] In or around January 2010 the plaintiff had engaged a licensed surveyor namely Juru Ukur Malaysia Timur to carry out a survey of the said lands to verify the buildings or structures erected by those persons or intruders who were in unlawful occupation of the said land or parts thereof and the surveyor has prepared a survey plan showing more or less 28 building structures erected mainly on the said land held under Provisional Lease No 076290036. A copy of the survey plan of the said lands prepared by the said surveyor is marked as 'LKS8' in the plaintiff's affidavit in support.

[13] The defendants and all other persons found in occupation of the said lands or parts thereof are trespassers or illegal squatters and have no licence to enter into or occupy the said lands or any part thereof and they cannot lay claim to any right or interest whatsoever to continue to remain in occupation of the said lands or any part thereof. The defendants' unlawful occupation of the said lands or part thereof are depriving the plaintiff of the use and enjoyment of the said lands.

THE DEFENDANT'S CASE

[14] Muhammed Sha bin Daris (NRIC No 770908–12–5059) affirmed an affidavit in opposition on behalf of himself, Bakri bin Aking (NRIC No 580915–12–5383), Nuna bt Aking (NRIC No 490712–12–5202), Kamra bt Karim (NRIC No 480521–12–5278), Raminah bt Panut (NRIC No 670806–12–5316), Din bin Karim (NRIC No 270628–08–5151), Idah bt Oting (NRIC No 550206–12–5244), Supri bin Amit (NRIC No

760613–12–5001) and Hata bin Hamjah (NRIC No 760602–12–5325) affirmed that:

(a) They are in truth and in fact Malaysian 'native' within the meaning of s 2(1)(a) of the Interpretation (Definition of Native) Ordinance (Sabah Chapter 64) and not 'trespassers' or illegal 'squatters'. As a native of Sabah, they affirmed that they have legal rights to lawfully occupy, cultivate and built tenements/building structures and houses on the said lands.

(b) The plaintiff has no proper and factual knowledge as to the truth of the defendants' status as registered members of the said cooperative society and the development of the said lands with permanent oilpalm plantation. They have not only cultivated and planted oil palm trees on the said lands but had also built their dwelling houses, and other building facilities and have continuously stayed and resided on the said lands for the past 30 years.

(c) That they are the registered and legal members of the said cooperative society, and only had knowledge of the plaintiff's alleged ownership of the said lands in late 2009 when a land search was conducted on the status of the cooperative society's said lands with the land and surveys authority, confirming the said lands, namely Provisional Leases Nos 076290036 and 07622148, were allegedly transferred to the plaintiff on 9 October 2009 and on 3 December 2009 respectively.

(d) As registered members of the cooperative society, they have truly developed the said lands for the past 30 years and are not 'respassers' or 'illegal squatters' as wrongfully alleged by the plaintiff but have 'native customary rights' and interests to claim ownership of the said lands (as laid under ss 65 and 66 of the Sabah Land Ordinance (Cap 68)).

(e) A land area of approximately 260 acres of the said lands have been fully developed and planted with oil palm trees by the defendants as occupants of the said lands.

(f) The conduct of the plaintiff as alleged registered owner in issuing the said 'notice of eviction' dated 21 December 2009 is against the law, depriving the defendants as 'natives', the legitimate rights to entitlement and ownership of the said lands after having resided, cultivated and developed the said lands with oil palm trees/plantation for the past 30 years.

(g) The plaintiff's unlawful eviction will cause them to suffer grave injustice and unnecessary hardship with no other alternative place to stay/homeless and is against the law of 'natural justice' to the defendants and to their families.

[15] A defendant by the name of Shariff Abdul Rahman bin Shariff Omang, on the other hand affirmed in his affidavit in opposition as follows:

(a) that all the persons in occupation of the said lands and referred to as the defendant in this suit are in true and actual fact Malaysians and are not 'trespassers' or 'illegal squatters' and have legal rights to lawfully occupy, cultivate and built tenements /building structures and houses on the said lands;

(b) that he is a registered and legal member of the said cooperative society since 1962 (Registration No 78/162) having its office address at Mile 36, Sg Memanjang, Simpang Jalan Beluran, Sandakan Sabah. During the tenure of his late father (Habib Ahmad bin Abd Rahman) who was the chairman of the said cooperative society, he was holding the position of 'secretary' in the said cooperative society;

(c) the plaintiff has no proper and factual knowledge as to the truth of the defendants' status as registered members of the said cooperative society and the development of the said lands with oil palm plantation which have been cultivated and planted by the defendants;

(d) the plaintiff is not the registered owner of the said two pieces of lands and stated that in the year 1962, the said lands both located at Mile 36, Sg Memanjang Simpang, Jalan Beluran, Sandakan, in the District of Sandakan, were approved and given for ownership to cooperative society by the State Government of Sabah under the provisions of 'Provisional Lease'. There were no previous applications for the above said two pieces of lands prior to the same being approved and alienated by the State Government of Sabah to the said cooperative society;

(e) he only had knowledge of the plaintiff's alleged ownership of the said lands in late 2009, when he conducted a land search on the status of the cooperative society's said lands with the lands and surveys authority, which confirmed the said lands, namely Provisional Leases Nos 076290036 and 07622148, were allegedly transferred to the plaintiff on 9 October 2009 and on 3 December 21009, respectively;

(f) the said 'notice of eviction' letter dated 21 December 2009 addressed to the defendants to vacate the said lands previously owned by the cooperative society, was issued by the plaintiff without giving the defendants reasonable reasons or explanation other than being the alleged registered owner of the said lands;

(g) the conduct of the plaintiff as alleged registered owner in issuing the said 'notice of eviction', is against the law, depriving the defendants lawful interests as villagers, and the right to entitlement and ownership of the said lands after having resided, cultivated and developed the same with oil palm trees/plantation and which eviction shall leave the defendants' with

no other alternative place to stay/homeless and cause grave injustice and hardship to the defendants' in general;

(h) the defendants referred to in this suit, are registered members of the cooperative society and have truly developed the said lands for the past 30 years. As such, matter of legal entity and rightful ownership of the said lands cannot be merely based on the allegations made by the plaintiff;

(i) that a land area of approximately 260 acres of the said lands have been fully developed and planted with oil palm trees by the said defendant;

(j) as a consequence of the members of the cooperative society, being unable to raise the necessary funds to develop the said lands, it was resolved by the cooperative society's annual general meeting on 4 October 1983, that membership of the cooperative society be opened to the public/outsiders other that those defendants who were already registered members/villagers domiciled and had cultivated the said lands with oil palm plantation;

(k) the Cooperative Society's Board Members despite having visited the said lands on sight and had proper knowledge and awareness of the defendant /villagers were not 'trespassers' but had in actual fact 'customary rights' to the said lands (as laid under ss 65 and 66 of the Sabah Land Ordinance (Cap68));

(l) The 'List of Membership' referred to as exh 'LKS7' issued by the cooperative society to the plaintiff is incorrect, inaccurate and does not reflect the actual status of membership of the cooperative society. The said defendants have truly developed, cultivated and permanently resided on the said lands on the high expectations that entitlement and share ownership in the said lands would be ultimately given the cooperative society to the said defendants. The following defendants who are not named in the said List of Registered Membership are listed hereunder and the relevant 'share certificates'/'quit rent receipts' are also produced and shown to him, marked and read under the following heading of exhibits:

(Name)	(NRIC NO)	(Exhibit)
1. Hidding bin Jalang	490201–12–5323	SAR1
2. Rupiah binti Osong	581011–12–5334	SAR2
3. Din bin Karim	270628–08–5151	SAR3
4. Dellang binti Changka	501208–12–5060	SAR4
5. Jalida bte Teppo	0331521	SAR5
6. Mariam bte Din	927025	SAR6
7. Watidah bte Hidding	0692771	SAR7
8. Kamra binti Karim	480521–12–5278	SAR8
9. Suryani binti Jakko	830717–12–5242	SAR9

10.Zainab bte Din	830717–12–5242	SAR10

(m) on 24 August 2006, the Cooperative Society's Chairman (namely, En Mutada bin Karudin — NRIC No 500101–12–5787) had abused his powers and authority by influencing the board members of the cooperative society to agree to the sale of the said lands based on incorrect information and false disclosure of material facts concerning the status of the defendants/villagers and the agricultural condition of the said lands. It was dishonestly stated by the said chairman that the acreage of the said lands developed by the defendants' oil palm plantation and in harvest stage consisted of ten acres only and that the defendants as occupants, were alleged to be 'illegal squatters' and for which the cooperative society board members had failed to evict from the said lands;

(n) that based on such false and dishonest information of facts furnished by the said cooperative society to Suruhanjaya Koperasi Malaysia, with the intention to defraud the defendant of their share ownership in the said lands held under the cooperative society's ownership, the said Suruhanjaya Koperasi Malaysia, ('SKM') subsequently approved the said lands to be sold accordingly;

(o) he had on the 25 January 2010, officially written and furnished a historical background of events of the said lands in dispute leading to the alleged transfer of the cooperative society's said lands to the plaintiff to the Anti-Corruption Agency, Malaysia (Suruhanjaya Pencegahan Rasuah Malaysia) at Sandakan, to conduct formal investigations pertaining to the affairs of the cooperative societies and the falsification of facts and information given by it's board members at it's annual general meeting held on 24 August 2006;

(p) upon having knowledge of the alleged transfer and registration of the said lands to the favour of the plaintiff which was done based on false and dishonest facts and information furnished by the said cooperative society to Suruhanjaya Koperasi Malaysia, he instructed his solicitors of Messrs Razak & Associates at Kota Kinabalu, to issue a formal 'Complaint Letter' addressed to the director/registrar of Cooperative Societies Malaysia (Suruhanjaya Koperasi Malaysia, Sabah) at Kota Kinabalu, stating matters of fraudulent actions and disclosure of false facts and information (given at the cooperative society's annual general meeting held on 24th August 2006) by board members of the cooperative society with respect to the sale and purchase transaction of the said lands to the plaintiff purposely done to deprive the rights and interest of the defendants' share ownership of the cooperative society's said lands; and

(q) the Cooperative Societies Malaysia (Suruhanjaya Kooperasi Malaysia Negeri Sabah) has issued a letter addressed to the defendants' said

solicitor's firm on the 13 April 2010, confirming that investigation were presently carried out by the said authority on the cooperative society under s 64 of the Societies Act 1993.

FINDINGS OF THE COURT

Whether the defendants are natives of Sabah within the meaning of s 2(1)(a) of the Interpretation (definition of native) ordinance and therefore they are not trespassers or illegal squatters but have 'native customary right' and interests to claim ownership of the said land

[16] The plaintiff submitted that whether the defendants is a native of Sabah or not is not a relevant and material issue as the issue of native customary rights is not an issue in this proceedings as the said lands which is the subject matter in this case are alienated lands with documentary land titles issued and not state land or lands held under native customary tenure without documentary title.

[17] The plaintiff further submits that the defendants' allegation that they have developed the said lands for the past 30 years cannot succeed against the said lands as the titles of the said land had been alienated and registered as early as 1967 and 1969 which is more than 43 years ago.

[18] Any claims to native customary rights, shall be decided by the collector of land revenue pursuant to s 14 of the Land Ordinance (Sabah Cap 68) and is statutorily provided in s 15 of the said Ordinance.

[19] In this case, the defendants are merely raising a claim to 'native customary rights' but failed to prove to this court that he has established such rights under s 15 before the collector of land revenue or that his claim has been dealt with by the collector of land revenue either by way of money compensation or by a grant of land title issued under part IV of the Land Ordinance as statutorily provided for in s 16 of the said Ordinance.

[20] The defendants are alleging that they have developed and built houses on the said land for the past 30 years which would put the time period sometime in 1980 or thereabout, well after the documentary titles to the said lands had been registered. Hence, the defendants' claim to native customary right occurring at a time well after the land titles were issued cannot be sustained (see *Ng Kon Yu v Sakim bin Saiking and Ors* [2006] 3 MLJ 533).

[21] In addition to the above, those persons named in para 1 of Mohammad's affidavit as Bakri bin Ateng, Nuna bt Aking, Hamina Bt Karim, Ramanah bt Panut, Din bin Karim, Idah bt Oteng, Supri bin Amit and Hata

bin Kamjah are not fit to be considered as defendants or person in occupation of the said lands as by their own admission in para 1 of Mohammad's affidavits, that they are permanently residing at Kampong Sg Batang Sandakan, District of Sandakan, Sabah and not at or within the said lands which are located at Mile 36, Sg Memanjang Sandakan. As such they are not competent to oppose the plaintiff's application or to make any allegations against the plaintiffs pertaining to the said lands or any part thereof.

Whether the defendants are the registered members of the cooperative society

[22] Learned counsel for the defendants submitted that the 'List of Membership' issued by the cooperative society to the plaintiff, is incorrect, inaccurate and does not reflect the actual status of membership of the cooperative society. Although the defendants names as specified at para 16 of the Shariff's affidavit in opposition are not listed in the said list of membership, the said defendants are registered members of the said cooperative society as shown in the share certificate/ quit rents receipts' issued by the said cooperative society in exhs 'SAR1', 'SAR2', 'SAR3', 'SAR4', 'SAR5', 'SAR6', SAR7', 'SAR8', 'SAR9' and 'SAR10'.

[23] Therefore it is the defendants contentions that the defendants being the registered members of the said cooperative society are in time and actual fact of Malaysian status and are not 'trespassers' or 'illegal squatters', as alleged by the plaintiff. As such the defendants have legal rights to lawfully occupy, cultivate and build structures and houses on the said lands.

[24] The plaintiff however submitted that the matters relating to membership of the said cooperative society are internal matters within the said cooperative society to be determined accordingly to the provision of the Co-operative Societies Act 1993. Hence, the proper place of the defendant to raise this allegation is with the said cooperative society. The letter dated 14 January 2010 from Suruhanjaya Koperasi Malaysia Negeri Sabah to the plaintiff had stated that the list of registered members kept by the said cooperative society shall constitute a valid registration and that any person whose name is not registered on the list of registered members kept by the said cooperative society shall constitute a valid registration and that any person whose name is not registered on the list of registered member is not a valid member of the said society.

[25] Further the reference to 'the defendants' in Shariff's affidavit in particular in para 16 thereof with regards to ten named persons a 'defendants who are not named in the said list of registered membership' is a non-issue as the deponent, Shariff Abdul Rahman bin Shariff Omang has no authority nor any standing to make such allegations or averment for the ten persons named

in para 16 of his affidavit. Accordingly, all the exhs marked as 'SAR1', 'SAR2', 'SAR3', 'SAR4', 'SAR5', 'SAR6', 'SAR7', 'SAR8', 'SAR9' and 'SAR10' in Shariff's affidavit are irrelevant and of no evidential value. More importantly, the ten named persons are not registered members of the said cooperative society according to the list of membership exhibited as exh 'LKS6' in the plaintiff's affidavit in support.

Whether the defendants have truly developed the said lands for the past 30 years and they are not trespassers or illegal squatters

[26] The plaintiff submitted that Shariff Abdul Rahman bin Shariff Omang who claimed himself as being a defendant in this case is not fit to be considered as a defendant or person in occupation of the said lands as he gave his residential address in his affidavit in opposition 'permanently residing at Kampong Sg Batang, Sandakan', District of Sandakan, Sabah and not at or within the said lands which is located at Mile 36, Sg Memanjang Sandakan. As such, Shariff ought to be disqualified as one of the defendants in this proceeding. Further he has no authority or standing to raise this issue on behalf of the 'defendants' or 'person in occupation' other than himself as it is clearly stated in para 2 of his affidavit that he is making the affidavit for himself.

Whether there is factual allegation of any of the person in occupation entering with consent of previous registered owner and evidence adduced

[27] The court is satisfied that there is no allegation of fact in any of the affidavit in oppositions from any of the 'defendants' or 'person in occupation' that they have entered into the said lands at any material time with the licence permission or consent of the previous registered owner ie the said cooperative society. On the contrary, the 'defendants' claimed as Malaysians and natives of Sabah they 'have legal rights to lawfully occupy, cultivate and built tenements/building structures and houses on the said lands'. In other words, the defendants are implying they do not need permission or consent to enter and cultivate the said lands or to do any of the things they have already done. Accordingly, an adverse inference and finding must be made against the defendants on this fact alone. It is to be noted that 'consent or licence to occupy land may only be given by one who is empowered by law to give such consent or to grant such a licence. In the ordinary case, it is the registered proprietor, in whom is vested the right of ownership, who may give such consent or grant a licence to occupy' (see *Zaibar Auto (M) Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd* [1996] 2 MLJ 221).

[28] As such the defendant are trespassers and squatters without any licence or consent whatsoever to occupy or continue to occupy the plaintiff's said land and that there are no triable issues in the instant application.

A MATTERS OF FRAUD CONDUCTED BY COOPERATIVE SOCIETY

[29] The learned counsel for the defendants submitted that at the 'Cooperative Society's Annual General Meeting' held on 24 August 2006, the Cooperative Society's Chairman (namely, En Mutada bin Karudin) had on 24 August 2006, abused his powers and authority by influencing the board members of the cooperative society to agree to the alleged sale of the said lands to the plaintiffs by furnishing false and incorrect information and material facts concerning the defendants/villagers status as 'registered members' and the 'agricultural condition' of the said lands to Suruhanjaya Koperasi Malaysia in order to obtain approval for the sale of the said lands to the plaintiff. The defendants subsequently wrote complaint letters to:

(a) Anti Corruption Agency, Malaysia, (Suruhanjaya Pencegahan Rasuah Malaysia) at Sandakan, on 25 January 2010 to conduct formal investigations on the cooperative societies affairs and the falsification of facts and information given by it's board members at it's annual general meeting held on 24 August 2006; and

(b) the Director/Registrar of Cooperative Societies Malaysia (Suruhanjaya Kooperasi Malaysia, Sabah) at Kota Kinabalu.

[30] Learned counsel for the defendants further submitted that as a result of the above letter issued to the director/registrar of Cooperative Societies Malaysia, the said authority issued a letter addressed to the defendant's solicitors of Messrs Razak & Associates dated 13 April 2010, confirming that investigation were being carried out by the said authority under s 64 of the Societies Act 1993 and is presently pending as at the date of filing of this submission.

[31] The plaintiff however submitted that they above allegations are directed against the chairman and/or the said cooperative society and are matter within the said cooperative society and have no bearing to the issue to be determined in the present application.

[32] The defendants' complaints to Anti-Corruption Agency, Malaysia and actions taken by the deponent against the said cooperative society or its board and do not affect the issues to be determined under the present application. The defendant's complaint to the relevant authorities concerned are matters for investigation or inquiry by the respective authorities and can be dealt with under the relevant provisions of the law governing such complaint or nature of such complaint and is therefore not a relevant issue for determination in these proceedings. The matters complained of do not advance the defendant's case to show the 'persons in occupation' of the said lands or any part thereof have any right or interest or just cause to be in possession in the first place to deny the

plaintiff as the registered owner of possession of the said lands.

CONCLUSION

[33] The defendants and all other persons found in occupation of the said lands or parties thereof are trespassers who have entered into and occupy the said lands illegally and therefore they cannot lay claim to any right or interest to continue to remain in occupation of the said lands or any part thereof.

[34] Based on the foregoing, the court allowed the plaintiff's originating summons against the defendants.

Plaintiff's originating summons allowed.

Reported by Kanesh Sundrum